IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 81-1442

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1832—Frank J. McGarr, *Judge.*

ARGUED OCTOBER 2, 1981—DECIDED APRIL 13, 1982

Before SPRECHER *and* WOOD, *Circuit Judges, and* BROWN, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This case concerns the scope of the labor exemptions to the federal antitrust laws. Here, contractors and their trade associations claimed that an alleged agreement between a union, a contractor, and a public utility violated Section 1 of the Sherman Act, 15 U.S.C. §1. Because we find that the acts alleged fall within both the "statutory" and "nonstatutory" labor exemptions we affirm the district court's dismissal of the complaint.

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*Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

I

The plaintiffs are three trade associations ("the Trade Associations") and two private contractors ("the Contractors"). The defendants are the Will County Carpenters District Council ("the union"), its international, Commonwealth Edison ("Edison"), and the Gust K. Newberg Construction Company ("Newberg"). The action stems from a labor dispute in Will County during the summer of 1979.

The Trade Associations represented most construction contractors in Will County and had traditionally negotiated a collective bargaining agreement with the union's construction workers which became the standard for all Will County contractors. In 1979, however, the Trade Associations and the union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the union.

At this time, Newberg was engaged in construction for Edison on a nuclear generating station under construction in Braidwood, Illinois, and an existing generating facilty in Romeoville, Illinois. Although Newberg was not a member of any of the Trade Associations, these projects were, nevertheless, subject to the strikes and lockouts.

Edison allegedly moved to prevent work stoppage on the projects by entering into an agreement with the union whereby Edison would "pressure" Newberg, as well as its other contractors, into paying into an escrow account $2.25

per employee for each hour worked during the strike.[1] The contractors were to pay this money into the account for all work done since the expiration of the previous contract, and the funds were to be released in accordance with any collective bargaining agreement negotiated by the union and the Trade Associations.[2] Edison agreed to compensate its contractors for this expense. Newberg employed approximately twenty-five per cent of the Will County union carpenters on its Edison projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the union agreed to a $2.25 per hour minimum wage increase retroactive to June 1, 1979.

The plaintiffs then brought this action in district court.[3] The complaint alleged that the defendants had violated Section 1 of the Sherman Act, tortiously interfered with contractual relations between the Trade Associations and their members, and engaged in a civil conspiracy to interfere with these contractual relations

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1. Edison's other contractors, who were members of one of the Trade Associations, were not named as defendants, although they too are alleged to have participated in the escrow agreement.

2. The amount paid to the escrow account was in addition to the existing wage scale. Thus, if the agreement ultimately reached between the union and the Trade Associations called for a $1.25 per hour wage increase, that amount would be paid out of the escrow fund, with the remainder returned to the contractor.

3. One of the trade associations first filed a complaint with the National Labor Relations Board alleging that the district union had failed to bargain in good faith. This claim was rejected by the Board. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (Sept. 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) Case 13-CB-8611).

The plaintiffs' Section 1 claim asserted that by entering into the escrow agreement, the defendants undercut the bargaining position of the Trade Association, thus forcing them to pay a retroactive wage equal in amount to that deposited in the escrow account. This amount, the complaint alleged, was artificially high, since it was subsidized by Edison which, as a public utility, was insulated from competition. Thus, the agreement was a combination, contract or conspiracy which imposed a wage scale that would injure the contractors, and which interfered with the "rights" of the Trade Associations to engage in collective bargaining.

Defendants Edison and Newberg moved to dismiss the complaint, and the district court granted this motion on February 11, 1981. The court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the court found, is exempt from antitrust scrutiny under the "labor exemption" created by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act ,29 U.S.C. §§ 104, 105 and 113. The court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted.[4] The plaintiffs challenge this ruling on appeal.

II

In reviewing the dismissal of a complaint, "the well-pleaded factual allegations of the complaint are taken as true." *Ashbrook* v. *Hoffman*, 617 F. 2d 474, 475 (7th Cir. 1980). *Accord, Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

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4. The court's opinion did not explain its dismissal of the state claims. However, as the defendants demonstrated in their briefs to the district court, dismissal of the state claims for lack of pendent jurisdiction was appropriate once the Sherman Act claim was dismissed. *UMW* v. *Gibbs*, 383 U.S. 715, 726 (1966). The plaintiffs do not challenge this aspect of the decision on appeal.

A dismissal will be upheld only "it it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Ashbrook* v. *Hoffman*, 617 F. 2d 474, 475 (7th Cir. 1980). The court, however, "is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Mitchell* v. *Archibald & Kendall, Inc.*, 573 F. 2d 429, 432 (7th Cir. 1978) (citations omitted). Furthermore, "conclusory alllegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe* v. *LaHue*, 663 F. 2d 713, 723 (7th Cir. 1981). *Accord, Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) ("In testing the legal sufficiency of the complaint . . . conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted."). An examination of the plaintiffs' complaint in light of these standards demonstrates that the district court properly dismissed the complaint.[5]

We begin with an examination of the history of the labor exemptions. Because this history has been told in detail elsewhere,[6] our sketch can be brief. Following passage of

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5. We recognize that the Supreme Court in *Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), cautioned against summary dismissal of antitrust claims, but we do not read *Poller* to require that we ignore Rule 12(b)(6) of the Federal Rules of Civil Procedure in the context of antitrust claims. "[I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F. 2d 549, 553 (7th Cir. 1980). *Accord, Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F. 2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

6. *See, e.g.*, Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 662-66 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-38 (1963); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955).

the Sherman Act in 1890, the courts found labor to be a commodity or article of commerce under the Sherman Act, and applied the Act to invalidate the collective bargaining agreements achieved by labor unions. *See, e.g., Loewe* v. *Lawlor,* 208 U.S. 274 (1908); *United States* v. *Workingmen's Amalgamated Council,* 54 Fed. 994 (C.C.E.D.La.), *aff'd,* 57 Fed. 85 (5th Cir. 1893). In response, Congress sought to specifically exempt labor union activity by enacting sections 6 and 20 of the Clayton Act. 15 U.S.C. § 17 and 29 U.S.C. § 52. Passage of the Clayton Act, however, failed to achieve this end, for the courts continued to apply the Sherman Act to union activities. *See, e.g., Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association,* 274 U.S. 37 (1927); *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921); *Alco Zander Co.* v. *Amalgamated Clothing Workers,* 35 F. 2d 203 (E.D. Pa. 1929). Congress, therefore, enacted the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.,* which sought to exempt labor activities from the application of various statutes. *See United States* v. *Hutcheson,* 312 U.S. 219, 235-36 (1941). The Clayton and Norris-LaGuardia Acts combined to provide a comprehensive exemption from antitrust liability for union activity.

In cases decided since the enactment of the Norris-LaGuardia Act, courts have defined the parameters of the labor antitrust exemption. As noted by the Supreme Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 621-22 (1975), this has resulted in two distinct exemptions to the antitrust laws—a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and a nonstatutory exemption based on an "accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in busi-

ness markets." *Id.* at 622.[7] We turn, therefore, to an examination of each of these exemptions to demonstrate that either one provided a sufficient basis for the district court's dismissal of the plaintiffs' complaint.[8]

A

The statutory labor exemption stems from the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act. 29 U.S.C. §§ 104, 105, and 113. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 621-22 (1975). Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Act prohibits the courts from enjoining specified acts by employees that occur in the course of disputes "concerning terms or conditions of employment" and

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7. Although the statutory and nonstatutory exemptions thus appear to be based on separate and distinct statutes, "'[a]ll the major cases involving labor's antitrust exemption have purported to accommodate the Clayton, Norris-LaGuardia, Wagner, and Sherman Acts.'" *Smitty Baker Coal Co.* v. *UMW,* 620 F. 2d 416, 423 n. 14 (4th Cir.), *cert. denied,* 449 U.S. 870 (1980) (quoting *The Supreme Court, 1974 Term,* 89 HARV. L. REV. 47, 236 n. 13 (1975)).

8. The district court did not analyze the case in terms of statutory and nonstatutory exemptions. However, "[i]t is well settled that on appeal a litigant is entitled to rely on any ground for affirmance, whether or not passed upon by the trial court." *City of Milwaukee* v. *Saxbe,* 546 F. 2d 693, 704 (7th Cir. 1976).

states that these acts cannot be "held to be violations of any law of the United States." 29 U.S.C. § 52.

The Norris-LaGuardia Act further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy.[9] The right to bargain collectively is specifically protected. [10] Although the Act does not by its terms provide a labor exemption from antitrust laws, "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H. A. Artists & Associates* v. *Actors' Equity Association*, 451 U.S. 704, 714 (1981). *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 723 (1977).

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9. A labor dispute is defined by the Act as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 20 U.S.C. § 113(c).

10. 20 U.S.C. § 102 provides:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . .

The statutory exemption was first interpreted by the Supreme Court in *United States* v. *Hutcheson*, 312 U.S. 219 (1941).[11] There, the Court rejected the claim that a union had violated the Sherman Act by, *inter alia*, inducing other unions to cease working for the employer with which the defendant union had a labor dispute. The Court found that Congress' intent in enacting the Norris-LaGuardia Act was to preclude not only injunctions against specified union activities in labor disputes, but Sherman Act liability for those actvities as well. *Id*, at 234-35. The Court enunciated a broad scope for the labor antitrust exemption:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote amitted).

In *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), the Court applied its *Hutcheson* formulation to find that the statutory exemption had been forfeited because the union defendant had conspired with employers to restrain trade. *Id.* at 809. In *Allen Bradley*, the plaintiffs were manufacturers of electrical equipment, manufacturing outside of New York City. The defendant was the local union representing electrical workers in New York City. The plaintiffs challenged an industry-wide agreement negotiated by the union which provided that contractors would purchase equipment only from New York City electrical manufacturers, and the manufac-

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11. Although the Court in *Apex Hoisery Co.* v. *Leader*, 310 U.S. 469 (1940), examined the Clayton and Norris-LaGuardia Act provisions, the Court's decision in that case appears to have rested upon a determination that the conduct did not violate the terms of the Sherman Act. Thus, it was not necessary to examine the statutory exemption.

turers would sell to contractors employing union members. Although the union was acting in its own self-interest, there was substantial evidence that it had conspired with non-labor entities. The Court noted that this evidence extended beyond the collective bargaining agreement which, "standing alone, would not have violated the Sherman Act." *Id.*[12] The Court, therefore, found that the union had forfited its stautory exemption.

As *Hutcheson* and *Allen Bradley* demonstrate, the central questions to be asked in determining whether the plaintiffs' complaint in this case alleged conduct not covered by the statutory labor exemption are whether the union acted in its own self-interest and whether a conspiracy between the union and a non-labor entity was properly pleaded. The plaintiffs concede that the agreement they allege between the district union and Newberg was in the union's self-interest. They claim that the agreement served to achieve an "artificially high wage increase," certainly a result that is in the union's interest. Thus, if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*. We find that the plaintiffs failed to properly plead such a conspiracy. While the plaintiffs' complaint uses the word "conspiracy" repeatedly, it cannot fairly be read to remove the alleged conduct from the reach of the statutory exemption.

Essentially, the plaintiffs seek to infer a conspiracy between Edison, Newberg and the union on the basis of the

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12. The Supreme Court made it clear in *Local 24, Int'l Bhd. of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959), that *Allen Bradley* was intended to set only "outside limits" on the normal rule that agreements reached concerning subjects of mandatory bargaining cannot lead to liability for violation of laws. The Court noted that such an approach was necessary to further the congressional policy "as expressed in the Wagner and Taft-Hartley Acts" of the "promotion of collective bargaining." *Id.* at 295.

escrow agreement reached between the contractors and the union. Yet, more than this is needed to plead a conspiracy that would remove the alleged agreement from the coverage of the labor exemption.[13]

Where plaintiffs base claimed conspiracies solely upon the existence of a collective bargaining agreement concerning subjects of mandatory bargaining,[14] courts have generally

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13. While the plaintiffs' complaint could be read to allege the existence of a conspiracy apart from the escrow agreement, such a reading would not be justified. The only factual assertion supporting the plaintiffs' conspiracy claim is the existence of the escrow agreement. The balance of the complaint simply infers a conspiracy from the existence of that agreemnt and alleges that it was entered into pursuant to "a conspiracy." This is insufficient, however. Mere "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe* v. *LaHue*, 663 F. 2d 713, 723 (7th Cir. 1981). *See Larry R. George Sales Co.* v. *Coal Attic Corp.*, 587 F. 2d 266, 273 (5th Cir. 1979) ("A general allegation of conspiracy . . . without a statement of the facts constituting the conspiracy, is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action. The pleader must allege the facts constituting the conspiracy, its object and accomplishment.").

14. Although the alleged "escrow agreement" between Newberg and the district union was not, strictly speaking, a collective bargaining agreement, the cases discussed herein are nevertheless applicable. The agreement allegedly reached was quite similar to a traditional collective bargaining agreement: it was between an employer and the collective bargaining agent of its employees over a subject of mandatory bargaining—wages. The fact that the final wage was not final, but rather was dependent on an external factor—the size of the wage increase granted by the Trade Associations—does not deprive it of that character. The cases holding that a collective bargaining agreement should not serve as the sole evidence of a conspiracy do not focus upon the formal requirements of a collective bargaining agreement. Rather, they focus upon the inappropriateness of basing a finding of antitrust conspiracy on an agreement reached as a result of the collective bargaining *process* commanded by the labor laws. A narrower reading of these cases would do substantial damage to the Norris-LaGuardia Act's goal of "full freedom . . . to negotiate the terms and conditions of . . . employment," 29 U.S.C. § 102, as well as the National Labor Relations Act's goal of reducing "industrial strife and unrest." 29 U.S.C. § 151.

held that these allegations are insufficient to remove the statutory exemption from union conduct.[15] "The mere combination by a union with 'non-labor groups' does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining." *Bodine Produce, Inc.* v. *United Farm Workers Organizing Committee*, 494 F. 2d 541, 558 (9th Cir. 1974).

In *UMW* v. *Pennington*, 381 U.S. 657 (1965), small mine operators brought an antitrust action against the coal

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15. Where collective bargaining agreements pertain to subjects which are not mandatory subjects of collective bargaining, some courts have held that the agreements can serve as evidence of a conspiracy. Under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." Thus, Justice White's opinion in *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), found that where a union and an employer agree on mandatory subjects of bargaining an exemption applies, but the exemption is lost when agreement is reached on such topics as prices, which are not proper subjects of collective bargaining. *Sit American Fed'n of Musicians* v. *Carroll*, 391 U.S. 99, 108 (1968); L. SULLIVAN HANDBOOK OF THE LAW OF ANTITRUST 727-28 (1977).

Here, the collective bargaining agreement concerned itself with wages—explicitly identified as a proper subject of collective bargaining. Thus, the statutory exemption applies. *See Bodine Produce, Inc.* v. *United Farm Workers Organizing Comm.*, 494 F. 2d 541, 551 (9th Cir. 1974) ("Union-imposed restraints which serve purposes closely related to wage, hours, and conditions of employment generally are considered free of *Allen Bradley* taint."). The logic behind this position is clear. "'[C]ollective-bargaining agreements over labor standards inevitably have anticompetitive consequences; to infer from these agreements the necessary elements of a conspiracy to restain trade under the antitrust laws makes no accommodation for the fact that the national labor policy is based upon the conclusion of these agreements.'" *Smitty Baker Coal Co.* v. *UMW*, 620 F. 2d 416, 423 n. 10 (4th Cir.), *cert denied*, 449 U.S. 870 (1980) (quoting Comment, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 704 (1968)). *See also* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1203 (1980).

miners' union. The basis of the complaint was that large employers and the union had entered into an industry-wide collective bargaining agreement that imposed a wage scale that small operators would be unable to pay. The plaintiffs claimed that this had been done for the purpose of driving them out of business.

The Court began its analysis by noting, in keeping with *United States* v. *Hutcheson*, 312 U.S. 219 (1941), that it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers." 381 U.S. at 664. The union loses the antitrust labor exception, however, "when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665. The Court qualified this statement by noting that

> Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. *Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy.*

Id. at 665 n. 2 (emphasis added). Thus, the union did not lose its exemption simply by entering into a series of collective bargaining agreements. The agreements alone could not

deprive the union of the labor antitrust exemption, absent further evidence of a conspiracy.[16] *Accord, California Dump Truck Owners Association* v. *Associated General Contractors*, 562 F. 2d 607, 611 (9th Cir. 1977) ("An antitrust action based upon the [collective bargaining agreement] alone does not state a claim upon which relief can be granted."). The Court, however, found that the plaintiffs had presented proof of an agreement by the union to seek the same wages from all employers, and thus there was an adequate allegation that the statutory exemption had been forfeited. *Id.* at 669.[17] Here, however, all the assertions of conspiracy are based upon the escrow agreement between the defendants.

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16. One commentator has distinguished Justice White's opinion in *Pennington* from his opinion in its companion case, *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), on this basis. "In *Pennington* the union had openly conspired with a group of employers," while "[i]n *Jewel Tea*, on the other hand, the collective bargaining agreement itself constituted the labor-non-labor combiantion." Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742, 755 (1966).

17. The Court also found that the nonstatutory exemption did not apply. *See* text accompanying notes 25-27, *infra*.

There is no allegation in the plaintiffs' complaint that the union adopted a "take it or leave it" stance in negotiations with the plaintiff contractors. Indeed, the National Labor Relations Board found that this was not the case. *See* note 3, *supra*. Thus, all that can be inferred from the escrow agreement is a promise by the employer to be bound by any wage increase, up to $2.25 per hour, that the union could negotiate with other contractors. Such agreements have never been held violative of the antitrust laws.

Furthermore, even if the union had adopted such a position, the plaintiffs would have to allege that this position stemmed from a *shared purpose* with a non-labor group, and was not maintained by a union "as a matter of its own policy.'" *Ramsey* v. *UMW*, 401 U.S. 302, 312-13 (1971) (quoting *UMW* v. *Pennington*, 381 U.S. 657, 664 (1965)).

Thus, the statutory labor antitrust exemption applies, and dismissal of the complaint was proper.[18]

The above method of analysis is not uniformly followed, however. Some courts, including the court below, have viewed *Pennington* as a distinct model of analysis imposing a strict series of requirements for finding a collective bargaining agreement to form the basis of an antitrust violation. *See Smitty Baker Coal Co.* v. *UMW* 620 F. 2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Embry-Riddle Aeronautical University* v. *Ross Aviation, Inc.*, 504 F. 2d 896, 903 (5th Cir. 1974); *Bodine Produce, Inc.* v. *United Farm Workers Organizing Committee*, 494 F. 2d 541, 560-61 (9th Cir. 1974); *Associated Milk Dealers, Inc.* v. *Milk Drivers Local 753*, 422 F. 2d 546, 553-54 (7th Cir. 1970).[19] These

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18. Further support for this proposition is provided by the Supreme Court's opinion in *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, the Court found that a union representing workers in the building trades violated the antitrust laws by exacting an agreement from a contractor not to subcontract work to firms lacking a collective bargaining agreement with the union. The Court noted that the union had no interest in representing the contractor's employees. Therefore, it noted that "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.* at 625-26. This suggests that an agreement would not be sufficient to evince a conspiracy where it was only contained in a collective bargaining agreement. *See Smitty Baker Coal Co.* v. *UMW*, 620 F. 2d 416, 424 n. 19 (4th Cir.), *cert denied*, 449 U.S. 870 (1980); *Larry V. Muko, Inc.* v. *Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F. 2d 1368, 1373 (3d Cir. 1979); *Commerce Tankers* v. *National Maritime Union*, 553 F. 2d 793, 801 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

19. Indeed, *Pennington* is sometimes viewed as a case in which the Supreme Court permitted an allegation of conspiracy to be based *solely* on an agreement concerning a subject of mandatory bargaining. *See e.g.*, St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 621 (1976).

requirements were accurately summarized by the district court below:

> Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose.

Mid-America Regional Bargaining Association v. *Will County Carpenters District Council*, No. 80 C 1832, slip op. at 4 (N.D. Ill. Feb. 11, 1981). *See also Smitty Baker Coal Co.* v. *UMW*, 620 F. 2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980).

The district court noted, and we agree, that under this analysis the plaintiffs failed to allege that the non-labor entities (Newberg and Edison) would *directly* benefit from the restraint. Tying its analysis to the Supreme Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), the district court correctly found that the primary effect of the agreement was on wage scales, and thus any benefit to non-labor entities would be indirect. *Mid-America Regional Bargaining Association* v. *Will County Carpenters District Council, supra* at 5.[20] Since ony antitrust competitive effect resulted "from the elimina-

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20. This approach tends to result in combining what the Supreme Court in *Conell* noted were two separate analyses. The court below thus seemed to base its decision on a combination of statutory and nonstatutory exemption grounds. While the court looked to specific statutes, its analysis of impact on the labor and business markets is identified in *Connell* as analysis appropriate to determining whether there is a basis for a nonstatutory exemption.

tion of wage competition," the labor exemption covered the alleged agreement. *Id.* at 5-6.

Although the district court did not find it necessary to look beyond the question of direct impact on the business market, we note that the plaintiffs' complaint also fails to properly plead a *concerted anti-competitive purpose.* This requires a shared purpose between the union and non-labor entities to restrict competition. The complaint here, however, alleges three *different* purposes for the agreement reached among the parties. The union allegedly entered the agreement to weaken the resistance of contractors to its wage demands (¶41(d)). Edison allegedly agreed to subsidize the agreement in order to maintain production on its generating stations (¶40(d)). Finally, Newberg allegedly entered into the agreement in order to force a ruinous wage increase and thereby gain an unlawful competitive advantage (¶41(e)).

These pleadings fail on two levels to demonstrate a concerted anti-competitive purpose. First, it is clear that each party had a separate and distinct purpose—there simply was no single shared purpose.[21] Second, the only *anti-com-*

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21. The complaint alleges that each party *knew* the likely results of its actions and, therefore, intended them. This is not enough, absent an allegation of *purpose,* to plead a cause of action under *Pennington.* As the court in *Embry-Riddle Aeronautical Univ.* v. *Ross Aviation, Inc.,* 504 F. 2d 896, 903 (5th Cir. 1974), noted:

> A rule of law requirig a lower level of intent than purpose would open the way to disastrous incursions upon Congressionally-sanctified areas of labor union activity. When a union imposes a collective bargaining agreement upon Company X, it will always advantage X by forcing the same agreement on competitor Company Y which theretofore offered less advantageous terms and working conditions. This is a fact of commercial life known to all unions. But if possession of that knowledge should mean that the union had to tread warily in negotiating with Y, refraining from striking, for example, or from taking a rigid bargaining stance for fear of losing the antitrust exemption, labor policy would be stood on its head.

petitive purpose alleged was possessed by Newberg. Yet the complaint fails to plead even this interest properly, for it alleges that Edison agreed to "pressure" its contractors into signing the escrow agreement with the union (¶40). Thus, the complaint alleges that the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into acting by a non-labor entity lacking anti-competitive intent. This pleading is clearly inadequate to fall within the *Pennington* model. *See Cedar Crest Hats, Inc.* v. *United Hatters, Cap & Millinery Workers*, 362 F. 2d 322, 326 (5th Cir. 1966).

The plaintiffs' complaint, therefore, failed to properly allege a conspiracy between the defendants in this case that would remove the complained of acts from the scope of the statutory labor exemption.[22] The district court properly dismissed the complaint.

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Even were we to find that the complaint contained adequate allegations of conspiracy to remove this case from the statutory labor exemption, this would not be dispositive. Where a complaint properly alleges a conspiracy between a

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22. Although both the statutory and the nonstatutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemptions would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment. "To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption." *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F. 2d 840, 847 n. 14 (3d Cir. 1974). *See also Amalgamated Meat Cutters & Butchers Local 576* v. *Wetterau Foods, Inc.*, 597 F. 2d 122, 136 (8th Cir. 1979); *Mackey* v. *NFL*, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

union and non-labor entities, a non-statutory antitrust exemption may still apply. This is true of this case.

The foundations of the nonstatutory exemption are not as easily identifiable as those of the statutory exemption. The origins of the exemption, however, are generally traced to Chief Justice Stone's opinion in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). *See e.g., Consolidated Express, Inc.* v. *New York Shipping Association, Inc.*, 602 F. 2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).[23] In *Apex Hosiery*, the Court found that a violent strike, which inevitably interfered with the flow of the employer's goods in interstate commerce, was not actionable under the Sherman Act. Although the Court examined the statutes underlying the statutory exemption, it did not base its decision upon the statutory exemption. Instead, it held that because the plaintiffs had failed to show that the union's actions had been intended to operate, and had operated, as substantial restraints on *commercial competition*, no claim was stated under the Sherman Act. The Court contrasted restraints on commercial competition with restraints on the market for labor. "It would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or restraints in restraint of trade or commerce under the Sherman Act." *Id.* at 503. While *Apex Hosiery* appeared to rest on the ground that substantive liability under the Sherman Act did not attach to the union activities complained of, later courts

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23. Others place the genesis of the non statutory exception much later, with the Supreme Court's decision in *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). *See, e.g., California Dump Truck Owners Ass'n* v. *Associated Gen. Contractors*, 562 F. 2d 607, 611 (9th Cir. 1977).

and commentators have viewed the case as establishing a nonstatutory exemption from Sherman Act coverage for restraints acting primarily upon the labor market. *See, e.g., Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F. 2d 494, 513 (3d Cir. 1979), *vacated on other grounds,* 448 U.S. 901 (1980); Leslie, *Principles of Labor Antitrust,* 66 VA. L. REV. 1183, 1196-97 (1980).[24]

This exemption was more explicitly developed by Justice White's opinion in *UMW* v. *Pennington,* 381 U.S. 657 (1965), and *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965).[25] In *Pennington,* after finding the statutory exemption inapplicable to an alleged conspiracy between mine operators and the union to impose a ruinous wage scale on small mine operators,[26] Justice White's opinion for the Court enunciated what is now known as the "nonstatutory exemption." *See Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622

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24. There is some question whether *Apex Hosiery* represents a finding of a lack of substantive liability as opposed to a finding that the conduct was exempted. Thus, one author states in one part of an article that "the actual holding" of *Apex Hosiery* "was that a union did not violate the Sherman Act by engaging in a violent primary sit-down strike," and in another that "the nonstatutory exemption apparently originated" in *Apex Hosiery.* St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law,* 62 VA. L. REV. 603, 606, 618 n. 64 (1976). While Justice Douglas decried the tendency to confuse the questions of liability and exemption, *Ramsey* v. *UMW,* 401 U.S. 302, 314 (1971) (Douglas, J., dissenting), much of the analysis of *Apex Hosiery* has been adopted in examining the nonstatutory exemption. *See e.g., UMW* v. *Pennington,* 381 U.S. 567, 666 (1965).

25. While Justice White did not write for a majority of the Court in *Pennington* or *Jewel Tea,* the Court has since looked to his opinions as authoritative expositions of the nonstatutory exemption. *See Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622 (1975).

26. *See* text accompanying notes 15-17, *supra.*

(1975). Justice White looked to "national labor policy" as expressed in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to determine whether anything in the Act conflicted with his conclusion that the union's agreement was a proper subject of antitrust scrutiny. 381 U.S. at 666. He found that national labor policy was, in fact, violated by an agreement which "strait-jacketed" the union into an agreement to seek higher wages than an employer could afford. *Id.* The Court compared this agreement with other illegal agreements where "the restraint on the product market is direct and immediate." *Id.* at 663. The effect of this agreement was to limit the unions freedom to act in its self-interest while furthering the employers' goal of elimination of competition. *Id. at* 666-67. Such an agreement was contrary to national labor policy and thus not entitled to any exemption from antitrust liability. *See* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1207 (1980). The Court emphasized that industry-wide collective bargaining, on the other hand, was permissible because "the effect on the product market, though clearly present, results from the elimination of competition based on wages among employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe." 381 U.S. at 664.

In *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*, the Court held that a union did not violate the antitrust laws by seeking and obtaining a collective bargaining agreement with retail stores which prohibited the sale of meat between six at night and nine in the morning. Justice White's opinion[27] suggested that, although there was no allegation

27. Justice White's opinion received the votes of only two other Justices. There was no opinion of the Court.

of conspiracy in the case, this did not automatically bestow an antitrust exemption upon the challenged agreement. *Id.* at 688-89.

Although this position seems to conflict with earlier statutory exemption cases, it can be reconciled with them when the nature of the agreement is considered. Justice White noted that "[e]mployers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689.[28] An agreement on such subjects, presumably, would receive the statutory exemption. Some agreements on nonmandatory subjects, such as price scales, however, could violate the antitrust laws. Since the agreement at issue in *Jewel Tea* fit neither category directly, it became necessary to examine whether an exemption based on policy rather than statutory language would apply:

> [T]he issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, *falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.*

Id. at 689-90 (emphasis added) (footnote omitted). In a footnote, the opinion made it clear that the "crucial determinant" was whether the agreement had a direct impact on labor interests or "the labor market." *Id.* at 690 n. 5. Thus, *Jewel Tea,* in conjunction with *Pennington,* suggests the existence of a labor exemption to the antitrust laws whose

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28. 29 U.S.C. § 158(a)(5) imposes a duty upon employers to engage in collective bargaining with employees.

boundaries were determined by attempting an accommodation between national labor policy and antitrust laws, which was reached in turn by an examination of the impact of a given agreement on the labor and product markets.[29]

This interpretation was confirmed by the Supreme Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, a general contractor sought to invalidate an agreement between the contractor and the union whereby the contractor agreed to deal with mechanical subcontractors only if they were parties to the union's multiemployer collective bargaining agreement. The Court began its analysis by noting that the statutory exemption does not exempt "concerted action or agreements between unions and nonlabor parties." *Id.* at 622. Nevertheless, the Court noted that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in the business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.*

The Court hinged its determination on whether the agreement between the union and the employer was a "direct restraint on the business market," as opposed to an in-

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29. A more general statement is that "the availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Mackey* v. *NFL*, 543 F. 2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (citations omitted). The *Connell* labor-business market distinction appears to serve as a generally applicable standard for making this determination. *Id.* at 614. Where an agreement primarily affects the labor market, the policy favoring collective bargaining is preeminent, but when an agreement has a direct impact on the business market, the antitrust laws are of greater concern.

direct restraint that would "follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. Because the union in *Connell* imposed "direct restraints on the business market" by limiting which subcontractors could receive the business of the contractor, the Court found that no exemption applied. *Id.* at 623. *Connell* is thus consistent with the *Apex Hosiery* mode of analysis—finding a nonstatutory exemption for restraints on the labor market which might indirectly affect the business market, but denying the exemption for direct restraints on the business market.[30]

This is the interpretation of the nonstatutory exemption adopted by the court in *Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F. 2d 494 (3d Cir. 1979), *vacated on other grounds,* 448 U.S. 901 (1980). There the court explained that "[t]he term nonstatutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market." *Id.* at 513. Thus, "the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act." *Id.* at 514. The *Consolidated Express* court recognized, therefore, that the central examination in *Connell* was whether there was a direct restraint on business. *Id.* at 517. *See also Commerce Tankers Corp.* v. *National Maritime Union,* 553 F. 2d 793, 801 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977).

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30. The *Connell* opinion's use of the term "business market" instead of "product market" was not, apparently, indicative of a change in the Court's approach. 421 U.S. at 622.

Thus, a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption. Restraints operating primarily upon the business market will fall within the scope of the exemption, regardless of any indirect effects that they may be alleged to have upon commercial competition. An examination of the plaintiffs' complaint in light of the nonstatutory exemption demonstrates that the district court properly dismissed the plaintiffs' complaint. The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny.

It is difficult to imagine a case in which the alleged agreement concerned wages more directly than the complaint here.[31] The crux of the complaint is an allegation that Newberg agreed to pay as much as a $2.25 per hour wage increase, depending on what other contractors did. The plaintiffs allege that the union knew that the effect of this agreement would be to cause other employers to offer a retroactive wage increase equal to the maximum contemplated by the union's agreement with Newberg. The restraint thus alleged is not a "direct restraint on the business market" but rather a direct restraint on the labor market, with only tangential effects on the business market. Any possible

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31. The Supreme Court has taken a broad view of what constitutes an agreement with a direct impact on the labor market. Thus, in *Local 24, Int'l Bhd. of Teamsters* v. *Oliver*, 358 U.S. 283 (1959), the Supreme Court examined a state antitrust challenge to a collective bargaining agreement. The agreement provided for a minimum wage scale for truck drivers and, to prevent evasion, included a provision that drivers who owned and operated their own vehicles would be paid a prescribed rental for their vehicles in addition to the required wage. The Supreme Court found that the state antitrust laws could not be applied. The Court found that the agreement was one directly affecting wages, and not " 'a remote and indirect approach to the subject of wages.' " *Id.* at 293.

harm to the plaintiffs would "follow naturally from the elimination of competition over wages and working conditions." *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975). Thus, the nonstatutory exemption would apply in this case

III

We conclude that the district court correctly dismissed the plaintiffs' complaint. Both the statutory and non-statutory labor exemptions served to immunize the defendants' activities from antitrust liability. The order of the dstrict court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION COMPANY, a Delaware corporation, and U.S. HOME CORPORATION, a Delaware corporation,

Plaintiffs,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, an Illinois corporation, and GUST K. NEWBERG CONSTRUCTION CO., an Illinois corporation,

Defendants.

No. 80 C 1832

MEMORANDUM OPINION AND ORDER

Plaintiffs, Mid-America Regional Bargaining Association ("MARBA"), the Contractors Association of Will and Grundy Counties ("CAWGC"), the Residential Construc-

tion Employers Council ("RCEC"), the Joliet Construction Company and U.S. Home Corporation have brought a three-count complaint charging defendants Will County Carpenters District Council ("Will County"), United Brotherhood of Carpenters and Joiners of America (AFL-CIO) ("District Carpenters"), Commonwealth Edison Company ("Edison"), and Gust K. Newberg Construction Company ("Newberg") with unlawful combination and conspiracy in restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. § 1, interference with contractual relationships and civil conspiracy.

The specific allegations stem from the following: Plaintiffs MARBA, CAWGC and RCEC are not-for-profit corporations engaged in the business of representing commercial and residential contractors in collective bargaining agreements. Joliet and U.S. Home are contractors, members of the plaintiff associations, who have delegated the responsibility for negotiating collective bargaining agreements with their employees to the plaintiff associations

According to the complaint, the collective bargaining agreements which had been in effect between the plaintiff associations and the District Carpenters expired on June 1, 1979. In early July, construction work in Will County, with the exception of work on Edison projects at Braidwood and Romeoville, was halted by work stoppages. During these work stoppages, the plaintiff associations and District Carpenters continued their collective bargaining.

The complaint then alleges that in July, 1979, the defendants entered into an escrow agreement, outside the collective bargining process, which imposed artificially high construction costs on every Will County contractor employing union carpenters. Under the terms of the alleged agreement, Newberg, an employer of a substantial number of

Will County union carpenters because of Newbergs contract to work at the two Edison plants, would put $2.25 per hour for each hour union carpenters worked on or after June 1, 1979, into an escrow account. Edison, a "stranger" to the union-employer relationship, allegedly instigated this arrangement and subsidized Newberg's payments. Moreover, plaintiffs contend that the escrow agreement applied to approximately twenty-five percent of the relevant market. Its effect, they assert, was to directly and irrevocably raise the minimum level of carpentry costs by twenty percent and to undermine the collective bargaining process in Will County.

This cause is presently before the court on the motions of several defendants to dismiss.[1] However, this court will limit its discussion to the issues raised in Edison's brief. We do so because the issues raised therein are dispositive of the case.

Edison bases its motion to dismiss on several theories. Chief among them is the assertion that plaintiffs have failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Fed. R. Civ. P., in that sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 20 U.S.C. §52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, and 113, which constitute the labor exemption to the antitrust laws, serve to exempt the defendants from the instant cause. The purpose of the labor exemption is to "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the

1. In addition to Edison's motion, District Carpenters filed a motion to dismiss or, in the alternative, for summary judgment. Newberg filed a motion to dismiss with accompanying "suggestions" in support of its motion, but it also adopted Edison's memoranda in support of the latter's motion to dismiss.

operation of the antitrust laws." *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975).

Edison maintains that the instant cause fits within the labor exemption because the only direct restraint alleged in the complaint is that of a restraint in the market for human labor—which is specifically exempted by section 6 of the Clayton Act. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). Edison contends further that the complaint contains no allegations that the alleged activities of the defendants resulted in a direct restraint of the business market, the effect of which would be to deprive defendants of the protection afforded by the labor exemption.

In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), the Supreme Court articulated guidelines for determining when an agreement between a union and a non-labor group to restrain the market for human labor is no longer exempted from antitrust litigation. *See also Smitty Baker Coal Co.* v. *United Mine Workers of America*, 620 F. 2d 416 (4th Cir. 1980). Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose. *Id.* at 665-69.

Plaintiffs admit that they have modeled their complaint after *Pennington* "in certain respects." Plaintiffs' Memorandum in Opposition to Motions to Dismiss at 27. However, that complaint is noticably deficient in one respect.

The plaintiffs fail to establish that the activities of Will County and District Carpenters were at the behest of, or in combination with, Edison and Newberg (entities which occupy positions in the competitve structure) so that the later defendants directly benefit from the restraint. *See Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

Connell Construction Co. v. *Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975) serves to shed more light on the complicated interface between the areas of antitrust and labor law. There, the defendant union forced the plaintiff general contractor to enter into an agreement the effect of which was to impose a *direct restraint* on competition among subcontractors who employed union members. The Court held that the union, by agreement with several contractors, had rendered non-union subcontractors ineligible to compete for a portion of available work. *Id.* at 625. "This kind of direct restraint on the business market has substantial anti-competitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.*

A restraint of this sort is not alleged here. The facts in the instant complaint allege only a direct restraint on the labor market. Edison concedes that a wage agreement may have an anti-competitive effect. However, that effect stems from the elimination of wage competition and is consequently protected from antitrust litigation by the labor exemption.

Included in our consideration is the recent decision of the Circuit Court of Appeals for the Ninth Circuit, *California State Council of Carpenters* v. *Associated General Contractors of California*, No. 77-2323 (9th Cir. Nov. 20, 1980) that plaintiffs offer in opposition to defendants' motions. In *California Council*, the unions argued that the de-

fendants, members of a construction industry employers organization, conspired to coerce property owners, general contractors and others to hire only contractors and subcontractors who had not signed agreements with the unions. Unlike the case at bar, there, the plaintiffs contended that the employers conspired to impose a *direct* restraint on the business market. The Ninth Circuit refused to apply the statutory labor exemption. *Id. California Council* is inapposite here because it involves a direct restraint on the business, not labor, market.

In conclusion, the court finds that the safe harbor provisions of the Clayton and Norris-LaGuardia Acts prohibit pleading a cause of action that is premised on an anticompetitive conspiracy involving unions when the restraint allegedly imposed by that conspiracy is not a direct restraint on the business market. As the direct restraint imposed here is not a direct restraint on the business market, but a direct restraint on the labor market, plaintiffs can plead no cause of action upon which relief can be granted. Accordingly, the motions of the various defendants to dismiss are granted; the case is dismissed.

ENTER:

/s/ Frank McGarr
UNITED STATES DISTRICT JUDGE

DATED: February 11, 1981

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.

Civil Action File No. 80 C 1832

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Frank J. McGarr, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the case is dismissed.
Dated at Chicago, Illinois, this 11th day of February, 1981.

ESCROW AGREEMENT

The undersigned employer agrees with the undersigned union to be bound by the verbal agreement reached on July 26, 1979 to establish an escrow account to be jointly administered by the undersigned employer and union. For each hour worked by members of the undersigned union for the undersigned employer on the Commonwealth Edison Company Braidwood and/or Will County Power Plants since June 1, 1979, an amount of $2.25 shall be placed in this joint escrow account by the undersigned contractor.

Upon completion of wage negotiations between the Mid-America Regional Bargaining Association (MARBA) and the undersigned union all monies contributed by the undersigned contractor to the escrow account will be returned to the undersigned contractor who will prepare a retroactive payroll reflecting the negotiated wage increase and all tax deductions (incl. FICA). The contractor will then issue net checks to all employees involved.

Weekly, an amount of $2.25 per hour for each hour worked by members of the undersigned union for the undersigned contractor at the Commonwealth Edison Will County and/or Braidwood Power Plants shall be transmitted to the jointly administered account and held until a wage settlement is agreed to between MARBA and the undersigned union.

WILL COUNTY CARPENTER COUNCIL
By: /s/ Gary G. Perinar
Dated: 8-17-79.

By: /s/ R. Bruce Kysler
Dated: August 9, 1979
Phillips, Getschow Co.
(Contractor)

NATIONAL LABOR RELATIONS BOARD
REGION 13

September 6, 1979

Charles E. Murphy, Esq.
Vedder, Price, Kaufman & Kammholz
115 South LaSalle Street
Chicago, Illinois 60603

Re: Carpenters District Council of Will
County and Vicinity
(Mid-America Regional Bargaining Association)
Case 13-CB-8611

Dear Mr. Murphy:

The above-captioned case charging a violation under Setion 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

From the investigation, the evidence does not show that the Carpenters District Council of Will County and Vicinity failed and refused to bargain in good faith with the Mid-America Regional Bargaining Association by the following acts and conduct: (1) unreasonably delaying the commencement of negotiation, failing and refusing to meet at reasonable times and places to negotiate a new agreement; engaging in take-it or leave-it bargaining; instituting and maintaining a strike against members of the Association prior to any impasse in negotiations being reached; inducing, encouraging and coercing members of the Association to withdraw from the Association and sign individual agreements wth the Union; refusing to permit representatives of the FCMS or the International Union to attend or assist

in the negotiations; and unlawfully insisting to impasse and engaging in a strike over certain non-mandatory subjects of bargaining. The evidence does show that the Carpenters Council of Will County and Vicinity failed and refused to bargain, upon request, about the subject of grievance arbitration; this aspect of the charge remains outstanding.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on September 19, 1979. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Alex V. Barbour
Regional Director

Enclosure
Certified Mail
(Return Receipt Requested)

cc: Carpenters District Coucil of
Will County and Vicinity
2112 West Jefferson Street, Suite 259-261
Joliet, Illinois 60435
Attn: George Perinar, Pres. & Bus. Rep.

Bernard M. Mamet & Associates, Ltd.
327 S. LaSalle Street, Suite 1326
Chicago, Illinois 60604

Mid-America Regional Bargaining Association
228 North LaSalle Street
Chicago, Illinois 60601

General Counsel, Office of Appeals
NLRB
Washington, D.C. 20570

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

October 19, 1979

Re: Carpenters District Council of Will County
and Vicinity
(Mid-American Regional Bargaining Association)
Case No. 13-CB-8611

Charles E. Murphy, Esquire
Vedder, Price, Kaufman & Kammholz
115 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Murphy:

Your appeal from the Regional Director's partial refusal to issue complaint in the captioned case has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of September 6, 1979.

Very truly yours,
John S. Irving
General Counsel

By /s/ Ronald M. Slatkin
Acting Director
Office of Appeals

cc: Director, Region 13
Carpenters District Council of Will County & Vicinity, 2112 West Jefferson Street, Suite 259-61, Joliet, Illinois 60435
Attn: George Perinar, President & Bus. Rep.
Bernard M. Mamet & Associates, Ltd., 327 S LaSalle Street, Suite 1326, Chicago, Illinois 60604
Mid-American Regional Bargaining Association, 228 North LaSalle Street, Chicago, Illinois 60601

APPENDIX

Section 1, Sherman Anti-Trust Act, 26 Stat. 209, as amended,, 15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities for the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty

thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 6, Clayton Anti-Trust Act, 38 Stat. 731, 15 U.S.C. § 17

"§ 17. Antitrust laws not applicable to labor organizations

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20, Clayton Anti-Trust Act, 38 Stat. 738, 29 U.S.C. § 52

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Section 4, Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104

"§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the Unted States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 5, Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 105

"§ 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

"No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the per-

sons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

Sections 13 (b) and (c), Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113 (b) and (c)

"§ 113. Definitions of terms and words used in chapter

"When used in this chapter, and for the purposes of this chapter —

. . .

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. . . ."